SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 913

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. In Point 5 of its brief, the respondent states that it discharged the impartial referee because the petitioner "objected to the reference." This is not true.

The objection was interposed, as the respondent itself acknowledged (A99), because respondent was charged with being an "interested party" and did not confer upon the referee any powers to make findings or to render any report (A99).

Thus, petitioner's objection was to the nature of the reference in that the accused "interested party", the respondent Court, did not divest itself from the decision-making process, but simply constituted the impartial referee as nothing more than a human tape-recorder.

After the petitioner interposed such a challenge and contested the respondent's right to pass judgment (A99a), the respondent discharged the referee and appointed itself to conduct the hearing because of what it stated to be "the need for expeditious administration of justice" (A100-A101) and not, as the respondent would like this Court to now believe, because the petitioner objected to the reference.

2. That part of the proceeding which the respondent quotes at the bottom of page 6 of its brief is taken out of context. The portion omitted by the three dots (. . .) does not refer to the completion of a sentence, but represents a full page of the record wherein the petitioner's counsel argued the issue of implied bias as a matter of law. For the Court's convenience the omitted colloquy is reproduced in Appendix A hereto (p. 4).

When read in proper context, the improperly quoted excerpt contains petitioner's thesis that the measure of procedural due process is not whether personal bias existed as a pure question of fact, but whether the re-

spondent, as a matter of law, was capable of affording the petitioner procedural due process in light of the totality of its involvement in this proceeding.

The issue thus, is not whether the respondent conducted the hearing with "meticulous fairness" or in any other mode, but whether it had the constitutional right to pass judgment at all.

As acknowledged by the New York Supreme Court in the related case of *Sarisohn* v. *Dennison,* 53 Misc. 2d 1081, 1084; 281 N.Y.S. 2d 475, 478, "Simply because the removal proceeding was conducted outside a familiar framework does not negate the manifest position of Sarisohn on the one side and the Appellate Division on the other, adversaries in that proceeding regardless of its characterization."

Petitioner's position before this Court is consistent with his position at every stage of the proceedings—that procedural due process of law means more than whether the respondent can be proven, factually, to be biased. Petitioner contends that the respondent could not afford its target procedural due process of law when it was so inextricably linked to every phase of this judicial removal proceeding.

Respondent's brief consequently fails to address itself to the essential issue of whether procedural due process of law extends to a judicial officer in the course of a judicial removal proceeding, or whether the respondent's "need for expeditious administration of justice" (A100-A101) can constitutionally justify the final solution in this case.

3. Point 4 of the respondent's brief suggests that this Court previously has rejected contentions that the concept of "cause" as contained in the pertinent state constitutional and statutory language is indefinite and vague

and hence violative of substantive due process of law. The petitioner takes issue with the respondent's interpretation of this Court's denial of *certiorari* in *Osterman* and the dismissal of the appeal in *Friedman,* as reflecting substantive adjudications by the Court to this effect.

The danger in permitting the respondent the latitude to perceive itself as the arbiter as to what constitutes "cause" for removal of a judicial officer in the absence of the establishment of definitive standards is strikingly portrayed by the respondent's recent decision this past December 31st in *Matter of Schmidt,* 31 A.D. 2d 214, a copy of which is appended hereto as Appendix B.

Schmidt is the President Judge of the Suffolk County District Court and was one of respondent's principle witnesses in petitioner's trial. The petitioner invites the Court to compare the Schmidt decision with his decision (Petition, Appendix C, pp. 45a-48a) and to find any common standard or definition of "cause" which permitted the respondent to conclude that Schmidt's misconduct "was not of such gravity as to justify the extreme penalty of removal from office" (Appendix B herein, p. 10) while the petitioner's misconduct justified not only his removal from office, but his unprecedented preclusion for life.

Respectfully submitted,

FREDERIC BLOCK
Counsel for Petitioner

[APPENDIX FOLLOWS]

APPENDIX A

. . . We raised the question of an implied bias as a matter of law, not to impugn upon the fairness of the Court whatsoever, but we felt that the whole removal procedure that has historically, as the Court of Appeals has indicated, been followed by this Court is suspect in the light of recent decisions by the United States Supreme Court.

These arguments have been presented before this Court. They were repeated before the Court of Appeals. The Court of Appeals upheld the procedure on the theory, as I glean from the language of the Court, that it has been the traditional way, and it struck the Court as late in the history of tradition to reconsider the nature of removal proceedings.

Justice Benjamin: Do I understand, Mr. Block, then that this objection is not ad hominem to this Court but merely for the purpose of preserving your possible constitutional rights?

Mr. Block: Certainly, Judge Benjamin, we want to preserve the subsequent constitutional arguments, if needed.

Justice Benjamin: But I understand you to say it is not—

Mr. Block: It would apply, of course, to any court that would be passing upon the removal proceeding.

Justice Benjamin: It is not by reason of the fact that these four justices chance to be the Court?

Mr. Block: No, I am claiming, as a matter of law. . . .

Appendix B

In the Matter of Proceedings in relation to Lincoln G. SCHMIDT, President Judge of the District Court of Suffolk County, Respondent.

Supreme Court, Appellate Division, Second Department.

PER CURIAM. Dec. 31, 1968.

By order of this Court made on May 17, 1967 Mr. Justice Thomas P. Farley was designated to conduct an investigation of the District Court of Suffolk County. Upon the submission of his report, this Court found that sufficient cause existed for the institution of a proceeding (pursuant to N.Y.Const. art. VI, § 22, subd. i; UDCA, § 103; subd. [e]; Code Crim.Proc. § 132) to remove respondent, President Judge of the District Court of Suffolk County, from office for cause.

There were four charges in the original statement of charges served upon respondent; thereafter, ten additional charges were preferred against him. There is no basic dispute as to the material facts. In his answer to the original four charges, respondent substantially conceded all of the factual allegations of these charges but pleaded for "Leave to show extenuating and mitigating circumstances" with respect to each of them. As to the additional ten charges respondent, in his answer and in his testimony at the hearing before this Court, has similarly conceded the factual occurrences, but has denied any impropriety in connection therewith.

CHARGES

It is alleged in the first charge of the statement of charges that in the prosecution of a truck driver for a violation of section 385 of the Vehicle and Traffic Law, the driver having discharged his attorney and the owner of the truck having sent the driver home from court, respondent directed that the owner be taken into custody until an appropriate information charging the owner with a violation of said section could be drawn against him. It was charged that the respondent's actions with respect to the owner, in directing that he be placed in custody, as a result of which the owner was handcuffed in the courtroom, constituted "improper, high-handed and oppressive conduct". It was further charged that the imposition by respondent of fines in the amount of $100 on each of five violations was contrary to and in violation of subdivision 16 of section 385 of the Vehicle and Traffic Law.

As alleged in the statement of charges and as developed at the hearing, it appears that in 1966 Paul Jackson, a truck driver employed by William A. Thompson, the owner of the truck, was given five summonses for driving an overloaded truck in violation of section 385 of the Vehicle and Traffic Law. In November, 1966, the driver was found guilty before the respondent with respect to two of the five violations and was fined the minimum amounts mandated by the statute, to wit: $100 for the first offense and $250 for the second offense.

On December 9, 1966, with a third case marked peremptorily for that date, the driver, his attorney and the owner of the truck appeared before the respondent on the third violation. The attorney asked the respondent to disqualify himself on the ground that he had previously heard two cases involving the same defendant, the same truck and the same conditions and that he might thereby be prejudiced. The motion was denied. Subsequently that day, the attorney moved to withdraw as counsel because of a dispute as to his fee. Respondent told Jackson that he would give him a short time to obtain an attorney and proceed to trial at 1:30 P.M., since the file indicated that the case had been continuously adjourned and had been marked peremptorily against him. When the court reconvened at 1:30 P.M., Thompson advised respondent that he had been unable to find an attorney and that he had sent Jackson home because he had complained of being ill. Thereupon, respondent directed that Thompson be placed in custody for the purpose of having an information drawn against him as the owner of the vehicle. Thompson was led from the courtroom with one wrist handcuffed.

Respondent testified that when he ordered the owner of the truck to be taken into custody for the purpose of having an information drawn against him, he believed that a prosecution for violation of the statute would properly lie against him as owner. However, during the recess, he was advised by the Assistant District Attorney that the charge could not be successfully prosecuted against the owner because of the difficulty of proving that he did "knowingly permit" the overweight violation. Thereupon, Thompson was released from custody, and in February, 1967 he appeared in respondent's chambers and delivered a check for $500 in full payment of all five violations. Respondent reduced the original $250 fine for the second overload violation and imposed $100 fines for each of the three remaining overload violations. Respondent testified that, at that time, it was not uncommon for a judge of said court to impose fines of less than $250 for second or subsequent offenses although the statute provided for a fine of not less than $100 for a first offense and not less than $250 for a second or subsequent offense. He explained that the administrative problems of processing the work through the court had, unfortunately, led him "to cut corners in some cases to get the work done and this was one of them".

The second charge, as amended, relates to a summons for speeding which one, Richard Felice received on January 6, 1966, returnable on February 16, 1966 in Patchogue. Felice did not appear on February 16th and, although respondent was not assigned to Traffic Court in Patchogue on that day, nevertheless, he dismissed the case for lack of prosecution and endorsed the dismissal on the back-up sheet. While admitting these facts, respondent denied that it was "improper, irregular and contrary to the orderly administration of justice"

Respondent testified that on the day in question he left the court in Commack, where he had been presiding, and, in accordance with his usual practice, brought with him certain court records to be filed in Patchogue. At the court house in Patchogue, where he arrived after 4:30 P.M., he was given the file in the Felice case and a clerk requested that he initial the dismissal so that the books could be closed for that day. Seeing a notation on the summons and back-up sheet indicating that the defendant had been advised of his right to counsel and of the provisions of section 335-a of the Code of Criminal Procedure and that the case had been adjourned to February 16, 1966, and being advised by a clerk that the case had been dismissed earlier that day by the judge who had presided in traffic court, but who had failed to appropriately mark the papers, respondent made the notation as above indicated dismissing the case.

The third charge, as amended, alleges that in 1965 one Joseph Gauch received a summons for passing a red light, which was returnable in Patchogue on December 22, 1965. The defendant did not appear on that day; however, he did appear in court late in the afternoon of the following day, December 23rd. The judge assigned to traffic court on that day had already left when Gauch arrived and Gauch was referred to respondent, who had just entered the building. Respondent asked Gauch how he pleaded. Gauch pleaded guilty and handed his driver's license to respondent. Respondent looked at the license and dismissed the charge. Respondent has admitted these facts but has denied that such disposition was "contrary to the proper and orderly administration of justice".

At the hearing before this Court Gauch testified that when he arrived at the court building on December 23, 1965 he was referred by a police sergeant to respondent; that he explained to respondent that he had passed a red light in order to avoid an accident and that if he had stopped, the automobile coming up behind him would have hit him; and that upon hearing this explanation, respondent signed the summons and said "Here, Merry Christmas". Respondent conceded, at the hearing, that he was "carelessly wrong" in dismissing the charge in the absence of the police officer who issued the summons.

The substance of the fourth charge is that respondent became involved in a bitter matrimonial dispute between one of his wife's sisters and her husband (William King). On September 27, 1965, respondent signed a complaint against his brother-in-law, charging him with disorderly conduct. That charge was dismissed in July, 1966 for lack of prosecution. On September 6, 1966, respondent signed an arrest warrant upon the complaint of another one of his wife's sisters, whose husband had been taken to the hospital earlier that day suffering from a heart

attack allegedly caused by the action of King, charging King with trespass. Respondent admitted this charge.

At the hearing the desk officer who had been at the police station testified that he had first attempted to call two Justices of the Peace to sign the arrest warrant, but when he was unable to contact either one of them he called respondent at the insistence of the complainant. There was also testimony to the effect that there was a real possibility of a continuing breach of the peace and that the legend "Bench Warrant * * No Bail Application * * * Hold for appearance before Justice", which appeared on the warrant, was placed there by the desk officer of his own volition after respondent had signed the warrant.

Charges 5 to 8, inclusive and 10 to 14, inclusive, of the additional charges are that respondent acted improperly in refusing to grant adjournments to the prosecution before dismissing certain youthful offender cases specified therein for lack of prosecution. Charge 9 alleged that in a certain prosecution the defendant was charged, in separate informations, with the crimes of malicious mischief. Youthful offender treatment was granted and respondent fixed January 26, 1967 as the date for trial. On that date, the Assistant District Attorney requested an adjournment on the ground that two eye-witnesses, friends of the defendant, were not present. Respondent refused to grant an adjournment and forced the case to trial, which resulted in the granting of defense motions to dismiss for failure of proof. With respect to the alleged eye-witnesses, respondent stated: "Let the record show there was a failure of proof on the * * * incident because the supporting witnesses did not appear to testify".

It is not necessary to detail respondent's testimony with respect to these additional charges. However, we note that as to each of them he testified as to the reasons which prompted the action which he took in either dismissing the cases for lack of prosecution or, in the case involved in the ninth charge, in forcing it on for trial.

FINDINGS

[1, 2] As to the first charge, we find that in the *Jackson* case, the pattern of conduct in seeking to disqualify respondent, in relieving the attorney for Jackson and in sending Jackson home without the permission of the court, in a case which had been marked peremptorily against the defendant, indicates that Thompson acted improperly and in a manner intended to frustrate the orderly process of the court. However, we further find that respondent unnecessarily over-reacted to the situation when, in a case involving a violation of the Vehicle and Traffic Law, he ordered Thompson to be placed in custody, as a result of which the latter was led from the court room with one wrist handcuffed. We

are also of the opinion that respondent erred in failing to impose the minimum fines required by the statute for the second and subsequent offenses.

[3] As to the second charge, we find that when respondent marked the case against Felice for speeding "dismissed", he was misled into doing so by the erroneous information which was contained on the back-up sheet and the information which was given to him by a clerk of the court. However, while it appears that respondent's action in marking the case "dismissed" was the result of a mistake, we must note that it would not have happened if respondent had adhered to the proper procedure, in all cases, of having the judge who dismisses or otherwise disposes of a case mark the actual disposition on the necessary papers.

[4] As to the third charge, respondent admitted that his action in dismissing the charge was "carelessly wrong" and we agree. While it appears that if the matter had been properly presented it may have warranted a dismissal in view of the driver's explanation as to why he passed the red light, nevertheless, the question involving the disposition of the traffic summons was not properly before respondent and, in any event, the charge should not have been dismissed without an opportunity being afforded to the police officer to present proof of the violation.

[5] As to the fourth charge, we find that there was a violation of sections 4 and 13 of the Canons of Judicial Ethics, Judiciary Law, Appendix, and of section 14 of the Judiciary Law, which proscribes a judge from participating in any matter in which he is related by consanguinity or affinity to any party to the controversy within the sixth degree. However, in view of the fact that the police had just unsuccessfully attempted to get another judge to issue the arrest warrant and that there was a distinct possibility of a continuing breach of the peace, which had already apparently resulted in the hospitalization of one person, we are of the opinion that there were mitigating circumstances which present an understandable excuse for respondent's misconduct.

[6] As to the fifth to fourteenth charges, inclusive, we believe that respondent may have acted with undue haste in dismissing some of the youthful offender cases for lack of prosecution and, in one instance, in forcing the case to trial although the prosecution was not ready to proceed. However, we find that he acted within the scope of his judicial discretion. We find no proof of improper or ulterior motives on the part of respondent with respect to these charges.

[7] We have indicated our disapproval of certain of respondent's actions and respondent has conceded error in several instances. We

find, however, that the nature of respondent's misconduct was not of such gravity as to justify the extreme penalty of removal from office. In those instances in which he acted improperly, he was not motivated by venality, pecuniary interest or advantage, or other improper objectives. The irregularities which have been found herein are not of such quality as, in our opinion, would warrant the imposition of the judicial sanction of "removal for cause". Accordingly, we direct that he resume his duties forthwith.

[8–10] There is a further matter, however, which merits our consideration. In our determination of the specific charges brought against respondent, certain practices have come to our attention as to which we deem it necessary and appropriate to formally state our views. We believe that, except under extraordinary circumstances, in cases involving traffic violations and other minor infractions, defendants should not be handcuffed and placed in detention cells either during a recess of the trial or while waiting for complaints to be drawn. Furthermore, we disapprove of the practice of imposing less than the minimum fines prescribed by the statute for violations of section 385 of the Vehicle and Traffic Law. We also disapprove of the practice of having a judge other than the one who has disposed of a case make the notation on the necessary papers. It is our view that when a judge takes final action disposing of a case, the required notation should be made by him personally and not by another judge. Finally, we disapprove of the practice of having a judge other than the one assigned to the traffic part dispose of traffic offenses. The disposition of traffic offenses should, at all times, be determined by the judge assigned to the traffic part and no judge should dispose of any matters which do not come within the scope of his assigned responsibilities.

In this proceeding to remove respondent, President Judge of the District Court of Suffolk County, from office for cause (N.Y.Const. art. VI, § 22, subd. i; UDCA, § 103, subd. [e]; Code Crim.Proc. § 132), the proceeding is closed, and respondent is directed to resume his duties forthwith.

This proceeding is closed.